Date: July 15, 1997

Case No.: 95-INA-540

In the Matter of:

DR. VLADIMIR LEVIT, M.D.,
Employer

On Behalf Of:

IZABELA SZCZUKA,
Alien

Appearance: Paul W. Janaszek, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On July 2, 1993, Vladimir Levit, M.D. ("Employer") filed an application for labor certification to enable Izabela Szczuka ("Alien") to fill the position of Family Dinner Service Specialist, Live-Out (AF 19-20). The job duties for the position are:

> Plans menus and cooks meals according to recipes. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. Serves meals. Performs seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. Prepare and cook meals according to principles of Kosher Cuisine.

The requirements for the position are eight years of grade school and two years of experience in the job offered.

The Employer requested a waiver of Schedule B on December 20, 1993 (AF 11); however, the Local Office determined that since the Alien has a letter of experience covering more than two years, it was not necessary (AF 37). On July 25, 1994, the Employer notified the Local Office that there were no applicants for the advertised position (AF 33).

The CO issued a Notice of Findings on March 2, 1995 (AF 40-42), proposing to deny certification on the grounds that it does not appear feasible that the duties described on the ETA 750A form constitute full-time employment as defined at 20 C.F.R. § 656.3. Accordingly, the CO directed the Employer to provide evidence that clearly establishes that the position, as performed in the Employer's household, constitutes full-time employment. Accordingly, the Employer was notified that it had until April 6, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated March 31, 1995 (AF 43-70), the Employer contended that the advertised position is based on business necessity and constitutes full-time employment in the context of his household. The Employer stated that, although he is now retired, he still devotes several hours per day to his practice, further study, and medical research, and that his wife is employed full time as a psychiatrist and is unable to prepare meals or do other related cooking duties. The Employer further stated that the cook will prepare meals for he and his wife, as well as their daughter and her two children and frequent professional guests. The Employer then stated that his daughter had been preparing all the meals for him on a full-time, unpaid basis because she was not working, but is now starting her professional career, and the Employer

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

enclosed a letter from his daughter to this effect. The Employer contended that the cook will not be required to perform any duties other than cooking and cooking-related duties, and he provided schedules of the daily duties and the length of time involved for each. Also, the Employer listed the dates he entertained guests and relied on restaurants and catering services to entertain these guests. Finally, the Employer enclosed a copy of his Income Tax Return for 1993, in order to substantiate his claim of being financially able to pay the prevailing wage to a cook.

The CO issued the Final Determination on April 10, 1995 (AF 71-73), denying certification because the Employer's documentation and evidence is not persuasive in establishing that the job duties constitute full-time employment, as defined at 20 C.F.R. § 656.3. The CO stated that the schedule provided by the Employer appears to be unrealistic. Additionally, the CO noted that the Employer supplied a list of dates but provided none of the other information required to help document his entertainment schedule. Next, the CO challenged the Employer's statement that his daughter was performing the duties of a cook, only, on a full-time basis, as she was also caring for her two children. Finally, the CO determined that none of the evidence provided establishes that the job duties listed on the ETA 750A form are full-time, eight hours per day, 40 hours per week employment.

On May 8, 1995, the Employer requested review of the Denial of Labor Certification (AF 74-88), and on August 4, 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). The Employer submitted a Brief on August 22, 1995.

Discussion

The factual findings of the CO generally are affirmed if they are supported by substantial evidence in the record as a whole. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951); *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 229 (1938). In the instant case, the CO made a factual finding that the Employer had not established that the job opportunity constitutes permanent, full-time employment. Thus, it must be determined whether that conclusion is a reasonable inference from this record.

Section 656.3 provides that "employment" means permanent, full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If the employer's own evidence does not show that a position is permanent and full time, certification may be denied. *Gerata Systems America, Inc.*, 8-INA-344 (Dec. 16, 1988). Further, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. *Collectors International, Ltd.*, 89-INA-133 (Dec. 14, 1989).

In this case, the CO asked that the Employer supply specific information regarding the job opportunity (AF 40-41). Specifically, the CO requested that the Employer provide evidence regarding the following: (1) the number of meals prepared daily and weekly and the length of time required to prepare the meals and the number of people for which the meals are prepared; (2) the frequency of household entertaining in the 12 calendar month period immediately

preceding the filing of the application, including the dates of entertainment and the number of guests entertained and the number of meals served; (3) the duties, other than cooking, that the Alien will be required to perform; (4) the daily and weekly work schedule of the parents, the school schedules of the children, and how the children are cared for during the Alien's scheduled time off; and, (5) who will perform the general household maintenance duties such as cleaning, clothes washing, vacuuming, etc.

In its rebuttal, the Employer asserted that he devotes seven to eight hours per day to his medical practice, further study, and scientific research. He further stated that his wife works from 9:00 a.m. until 5:00 p.m. (AF 69). The Employer asserted that the Alien will prepare meals for himself, his wife, their daughter, and her two children. He explained that his daughter previously did the cooking; however, she is not able to continue doing so as she is now working full time. The Employer stated that the Alien would only be required to perform cooking-related duties and provided a typical menu, along with preparation time for each meal. In summary, the Alien would be required to prepare five snacks, three lunches, three afternoon meals, and five dinners per day. In addition, the Employer stated that the Alien would be required to cook three to six extra dinners per week for business guests. The Employer also provided the specific dates which his family entertained guests over the prior year, as well as receipts for business dinners. Finally, the Employer provided a copy of his 1993 Income Tax Return.

As indicated, the issue here is whether or not the CO's conclusion, that the Employer has failed to establish that full-time employment is being offered, is a reasonable inference from these facts. We conclude that the CO's decision is reasonable, particularly in view of the Employer's failure to provide all of the information requested by the CO regarding the Employer's entertainment of guests. While the Employer did provide dates of entertainment, and stated that the meals were all for "professional" guests, he did not indicate the number of guests entertained on the dates. We emphasize that the burden of proof rests with the Employer, and under these circumstances find that the CO's determination is supported by substantial evidence.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary

to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.